HIGH COURT OF UTTARANCHAL AT NAINITAL

Criminal Misc. Application No.991 of 2006

Vipul Jain S/o Sri Ravindra Jain, Proprietor
M/S Mahavir Trading Company, Main Road,
Vikas Nagar, Dehradun r/o Chai Bagh Harbartpur,
P.S. Vikas Nagar, Dehradun .....Applicant.

Versus

1. State of Uttaranchal.
2. Ramesh Chandra s/o Sri Jai Chand Malhotra
R/o Kalyanpur Opp. Excise, Vikas Nagar at
present r/o Bhatada Mohalla, P.S. Vikas Nagar.
.....Respondents.

Hon'ble Rajesh Tandon, J.

Heard Sri Sandeep Tandon Counsel for the petitioner and A.G.A. for the State.

By the present application filed under Section 482 Cr. P.C. the applicant has prayed for quashing the order dated 1.7.2006 and 17.3.2006 passed by the Session Judge, Dehradun and Special Judicial Magistrate, Dehradun.

According to the applicant he filed a complaint case No. 3260 of 2003 Vipul Jain vs. Ramesh Malhotra before the Judicial Magistrate, Dehradun under section 420 I.P.C. against the respondent no.2. The case was fixed for 17.3.2006 but due to some personal problem the applicant could not appear in the court on that date, therefore, the learned Magistrate dismissed the complaint in default. Against the order of the Judicial

Magistrate, the applicant filed a criminal revision no. 70 of 2006, before the Sessions Judge, which was also dismissed vide order dated 1.7.2006.

The counsel for the applicant has submitted that the learned Magistrate has no jurisdiction to dismiss the complaint in default of the complainant.

Section 249 Cr. P.C. reads as under:

> ***249. Absence of complainant-****When the proceedings have been instituted upon complaint, and on any day fixed for the hearing of the case, the complainant is absent, and the offence may be lawfully compounded, or is not a cognizable offence, the magistrate may, in his discretion, notwithstanding any thing hereinbefore contained, at any time before the charge has been framed, discharge the accused.*

Thus for discharge of the accused in the absence of complainant the following conditions are to be fulfilled:

1. The prosecution must have been initiated on a complaint.
2. The complainant has failed to appear on the date of hearing.
3. The offence can be lawfully compounded or is not cognizable.
4. It must be before the charge is framed.

The offence under section 420 I.P.C. is cognizable and non-compoundable. Thus the accused cannot be discharged in the absence of the complainant.

So far as discharged of the accused under section 245 (2) Cr. P.C. is concerned, the accused may be discharged on failure to

produce witness by the complaint, and the case is dragged on due to such successive lapse of the complainant. Section 245 (2) Cr.P. C. reads as under:

> *(2) Nothing in this section shall be deemed to prevent a magistrate from discharging the accused at any previous stage of the case if, for reasons to be recorded by such Magistrate, he consider the charge to be groundless.*

There is nothing inherently unreasonable for the Magistrate coming to the conclusion that the charge is groundless and that the accused person be discharged, if the complainant fails to produce witness under section 244 Cr. P.C. for examination before framing of the charge. But in the present case the order is completely silent regarding failure of the complainant to produce witnesses under section 244 Cr. P.C.

In view of the above, impugned orders dated 17.03.2006 and 1.7.2006 are set aside. The matter is remanded to the trial Court for proceeding with the case after affording opportunity to the complainant to produce witnesses under section 244 Cr.P.C.

Accordingly, application under section 482 Cr. P.C. is allowed.

Rajesh Tandon, J.

Dated: 7.12.006
***Dhyani**